(10) (10)

Nos. 90-711 and 90-712

In The

Supreme Court of the United States

October Term, 1991

LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK and NATHANIEL GOSHA, III, individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court For The Middle District Of Alabama

REPLY BRIEF OF THE APPELLANTS

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Argument in Reply

Put simply, appellees' briefs read as if they were written in an historical vacuum. They completely ignore Congress' purpose in enacting, and thrice extending, § 5: to assure that the voting rights of black citizens in jurisdictions such as Russell and Etowah Counties are not effectively nullified by the substitution of subtle and ingenious tactics for outright disenfranchisement. Instead, appellees advance a narrow, formalistic notion of the right to vote that has been repeatedly rejected by Congress, the Attorney General, and this Court. They suggest that as long as a jurisdiction disguises changes in its voting standards, practices, and procedures by calling them something innocuous--like a "common fund resolution" (Etowah County) or a "ministerial" reallocation of authority (Russell County)--it can ignore with impunity Congress' carefully considered judgment that preclearance of all such changes is critical to the protection of minority voting rights. Congress did not enact the Voting Rights Act as just another weapon for attacking discrete acts of state officials designed to discriminate against black people. Rather, the purpose of the Voting Rights Act is to ensure that the institutional structures and rules by which such discrete decisions are made provide blacks full and equal participation in the political process.

Appellants' reply brief proceeds in four parts. First, we review the background, ignored by the appellees, against which § 5 was enacted in 1965, and was extended in 1970, 1975, and 1982, to show that § 5's central purpose was to protect black voters from the erection of new barriers to full participation in the political process. Second, we restate the standard to be applied by courts faced with claims of § 5's *coverage* (that is, local three-judge courts, and this Court, when it reviews their decisions): if, the nature of the challenged change is such that, under *any* set of facts, the Attorney General or the United States District Court for the District of Columbia *could* conclude that the challenged

change[1] has either the purpose or the effect of denying the right to vote, a jurisdiction must seek preclearance. The final two sections show how the Etowah and Russell County enactments fall within the scope of § 5.

I. Section 5 was adopted in reaction to covered jurisdictions' long history of cunning stratagems for denying effective voting rights to their black citizens.

Congress' decision to enact § 5's "stringent" and "extraordinary" preclearance process, *McCain v Lybrand*, 465 US 236, 244 (1985), was the product of its experience with the intransigent refusal of Southern jurisdictions, including Alabama, to comply with constitutional, statutory, and judicial commands guaranteeing black citizens the right to vote.

A. *A brief history of disenfranchisement efforts in Alabama.*

The Fifteenth Amendment and the Alabama Constitution of 1867 gave black citizens the formal right to vote for the first time in Alabama history. *See United States v Alabama*, 252 FSupp 95, 97 (MD Ala 1966) (3-judge court). But following the end of Reconstruction, white supremacists regained control of the state government and sought, in a variety of both subtle and direct ways, to eliminate black political power. The state legislature passed a series of local laws giving the governor the power to appoint county commissions in "counties threatened with black voting majorities." *Dillard v Crenshaw County*, 640 FSupp 1347,

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1. In this case, it is essentially undisputed that both the Etowah Common Fund Resolution and Act 79-652's transfer of roadwork authority from the Russell County Commission were "changes" from pre-existing procedures. Appellees argue only that they were not changes "with respect to voting."

1358 (MD Ala 1986).[2] In 1893, the legislature passed the so-called "Sayre Law," which enacted a complex set of registration requirements, deprived illiterate voters of real assistance in casting their ballots, and effectively eliminated Republicans and Populists from local registration and election boards. The Sayre Law caused a tremendous drop in black political participation. *Brown v Board of School Commissioners*, 542 FSupp 1078, 1091 (SD Ala 1982). In 1894, a number of counties moved from district-based to at-large elections to dilute the voting strength of those blacks who still voted. *Dillard*, 640 FSupp at 1358.

At its 1901 Constitutional Convention, Alabama adopted a new constitution one of whose "major purpose[s] ... was to disenfranchise black persons." *Id.*; *see also Hunter v Underwood*, 471 US 222, 229 (1985) (purpose of the 1901 Alabama Constitutional Convention was "to establish white supremacy in this State," according to the president of the Convention); *United States v Alabama*, 252 FSupp at 98-99 (delegates to the 1901 convention "were anxious to provide devices that would avoid a legal attack based on the Fourteenth and Fifteenth Amendments but still successfully subvert the purpose of those amendments"). Because of the adoption of a series of techniques--among them a poll tax;[3] a grandfather clause; and good character, education, residence, employment, and property qualifications, *see id.* at 99--by 1909, "all but approximately 4,000 of the nearly 182,000 black persons of voting age had been removed from the rolls of eligible voters." *Dillard*, 640 FSupp at 1358; *see also United States v Alabama*, 252 FSupp at 99 (100,000 black Alabamians had *voted* in 1900, but by 1908, only 3742 were even *registered*).

In addition, during the first two-thirds of this century, Alabama was essentially a one-party state. Until 1946, the Alabama Democratic Party maintained a white primary. *Brown*,

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2. Appellee Etowah County Commission was one of the named defendants in *Dillard v Crenshaw County*.

3. In *United States v Alabama*, the three-judge district court held that the poll tax violated the Fifteenth Amendment.

542 FSupp at 1092. Since the Democratic nomination was tantamount to election, there was little reason for even those blacks who could register and vote to participate, since their votes in the general election were essentially meaningless. When, however, this Court outlawed white primaries in *Smith v Allwright*, 321 US 649 (1944), the specter of genuine black participation in the electoral process prompted Alabama to adopt the "Boswell Amendment," which granted local boards of registrars sweeping discretion designed to "enable them to prevent from registering those elements in our community [i.e., blacks] which have not yet fitted themselves for self-government." *Brown*, 542 FSupp at 1092 (internal quotation marks omitted). Ultimately, a three-judge court struck down the Boswell Amendment as a purposeful attempt to prevent blacks from voting. *Davis v Schnell*, 81 FSupp 872, 879-81 (SD Ala 1949) (3-judge court), *aff'd*, 336 US 933 (1950).

Despite the plethora of formal and informal barriers placed in their way, increasing numbers of black citizens began to seek to register and to vote during the 1950's. The state legislature and local officials responded to this trend by devising new mechanisms for minimizing black political power. Perhaps the most notorious was the Tuskegee gerrymander, *see Gomillion v Lightfoot*, 364 US 339 (1960), which redrew the city limits to exclude all but a handful of Tuskegee's black residents. Blacks could continue to vote in other elections, but they were no longer in a position to elect city officials. In addition, the legislature employed such tactics as outlawing single-shot voting,[4] enacting numbered-place requirements, and replacing district-based elections with at-large elections, for the purpose of further diluting black voting strength. *Dillard*, 640 FSupp at 1356, 1357, 1359. Even if blacks were able to register and to vote, these devices would prevent them from "electing one of their own race," *id.* at 1357 (quoting a state senator's explanation of the purpose of banning single-shot voting).

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4. For an explanation of why bans on single-shot voting can impair black voting strength, see, e.g., *City of Rome v United States*, 446 US 156, 184 (1980); US Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-07 (1975).

Put simply, as soon as one avenue for excluding blacks from the political process was cut off, state and local officials sought another. As one district court--upon whose observation Congress explicitly relied in explaining the need for § 5, *see* S. Rep. No. 162, 89th Cong., 1st Sess., *reprinted in* 1965 US Code, Cong. & Ad. News 2508, 2550 (joint views of 12 members of the Judiciary Committee) [hereafter "1965 Senate Report"]--noted:

> [I]n spite of [repeated] judicial declarations [forbidding various discriminatory schemes], the evidence in this case makes it clear that the defendant State of Alabama ... continues in the belief that some contrivance may be successfully adopted and practiced for the purpose of thwarting equality in the enjoyment of the right to vote by citizens of the United States ....

United States v Penton, 212 FSupp 193, 201-02 (MD Ala 1962) (3-judge court) (internal quotation marks omitted).

B. *Congress' commitment to preventing further "contrivances" for diluting the black vote.*

Among other things, the Voting Rights Act of 1965 suspended the use of various tests and devices that had been used to prevent blacks from registering and voting in jurisdictions such as Alabama. But experience under legislation passed in 1957, 1960, and 1964 had shown "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment," H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 US Code, Cong. & Ad. News 2437, 2441. "Barring one contrivance too often has caused no change in result, only in methods." *Id.*; *see also* 1965 Senate Report at 2543.

It was "[i]n order to preclude such future State or local circumvention of the remedies and policies of the 1965 act" that Congress passed § 5. H.R. Rep. No. 91-397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 Cong. Code & Ad. News 3283 [hereafter "1970 House Report"]; *see also South Carolina v Katzenbach*, 383 US 301, 335 (1965) (noting that covered states

"had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating black political powerlessness in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies contained in the Act itself").

Each time that Congress has revisited § 5, and renewed and strengthened its commitment to § 5's preclearance scheme, it has also reiterated its concern that, "with discrimination in registration and at the voting booth blocked," states and counties will develop other sorts of legislation to "undo or defeat the rights recently won by nonwhite voters." 1970 House Report at 3284; *see also, e.g.*, S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975)[5] [hereafter "1975 Senate Report"]; H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 14 (1982)[6] [hereafter "1982 House Report"]; S. Rep. No. 97-417, 97th Cong., 2d Sess. 6 (1982)[7] [hereafter "1982 Senate Report"]. Of particular salience to this case, Congress has pointed to changes which *it* defines as involving *"rules or practices affecting voting"* such as "abolishing or making appointive offices sought by Negro candidates" and "extending the term of office of incumbent white officials," 1970 House Report at 3283, as examples of the kind of structural device § 5 is intended to prevent. Congress has repeatedly recognized that such manipulation of the conditions of office-holding can profoundly affect the value of the votes that blacks are now able to cast. *See, e.g.*,

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5. "As registration and voting of minority citizens increases, other measures must be resorted to which would dilute increasing minority voting strength."

6. "The Committee has observed ... continued manipulation of registration procedures and the electoral process which effectively exclude minority participation from all stages of the political process."

7. "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote .... The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act."

1975 Senate Report at 17; 1982 House Report at 18; 1982 Senate Report at 7; *see also, e.g.*, US Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 168-69 (1975) (describing injunction issued in *Jackson v Town of Lake Providence*, Civil No. 74-599 (WD La July 11, 1974)), to prevent the departing white city council members from transferring control of the municipal power plant [Lake Providence's sole source of revenue] to an all-white commission before the black mayor and new, majority-black city council took office); *Sellers v Trussell*, 253 FSupp 915, 917 (MD Ala 1966) (3-judge court) (holding that an extension of incumbents' terms violated the Fifteenth Amendment because it was designed to "freeze Negroes out").

Precisely because of this history, Congress has squarely rejected the idea that there can be any *per se* or *de minimis* exemptions from § 5's coverage: "The discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context." 1982 House Report at 34-35; *see also* 1982 Senate Report at 7 (§ 5 "require[s] review of *any* new laws in covered areas that could directly or indirectly impair the right to vote") (emphasis added); *Allen v State Board of Elections*, 393 US 544, 566 (1969) ("Congress intended to reach any State enactment which altered the election law of a covered State in even a minor way."); *id.* at 568 (quoting Attorney General Katzenbach at the 1965 House hearings as rejecting the idea of any categorical exclusions "because there are an awful lot of things that could be started for purposes of evading the 15th amendment if there is the desire to do so"). Thus, "far from exempting alterations that might be perceived as minor, Congress failed to adopt such a suggestion when it was proposed in debates on the original Act." *NAACP v Hampton County*, 470 US 166, 176 (1985). See Brief for the United States at 21-22.

The legislative history thus points unambiguously in one direction: § 5 was intended to assure that states and localities could not "continue their historical practice of excluding Negroes from the Southern political process," 1982 Senate Report at 7 (quoting 1965 Senate Report), by substituting more sophisticated exclusion-

ary and dilutive techniques for outright disenfranchisement. Congress recognized that the Attorney General and the District Court for the District of Columbia would be called upon the assess the purpose and effects of "complex and subtle" practices. *Id.* at 12. But it firmly concluded that without such review, black Americans would continue effectively to be denied the right to vote.

II. Courts deciding § 5 coverage issues should apply the "potential for discrimination" test.

The standard to be applied in deciding whether a particular enactment requires § 5 preclearance is a direct outgrowth of the congressional concerns outlined in the preceding section.

As the United States and appellants have already noted, Appellants' Brief at 19-21, Brief for the United States at 11, 22-23, a § 5 coverage court may decide only whether preclearance is required, and *not* whether the challenged enactment actually has the purpose or effect of discriminating. *See, e.g., Dougherty County Board of Education v White*, 439 US 32, 42 (1978); *Georgia v United States*, 411 US 526, 534 (1973); *Perkins v Matthews*, 400 US 379, 383-85 (1971). This decision is analogous to the question before a court faced with a motion to dismiss a complaint under Fed R Civ P 12(b)(6). The question a coverage court should ask is whether it can imagine a set of facts which might lead the Attorney General or District Court for the District of Columbia to conclude that the change was adopted for the purpose or will have the effect of denying or abridging the right of black citizens to vote. *Cf. Conley v Gibson*, 355 US 41, 45-46 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). If the coverage court can envision such a set of facts, its job is at an end: it must enjoin the challenged change until the jurisdiction seeking to implement the change has successfully completed the preclearance process.

The court below expressly acknowledged that it did not intend to foreclose appellants' constitutional claims under the Fourteenth and Fifteenth Amendments or their substantive claims under § 2 of the Voting Rights Act. *See* JS A-18 n. 17; JS A-20 n. 18; JS A-21 n. 21. But to say those claims are not foreclosed--and neither appellee really argues to the contrary, *see* Etowah Brief at 23 n. 30--requires acknowledging that a trial on the merits might show that the Common Fund Resolution and Act 79-652 had been adopted for the purpose of depriving appellants of their right to vote on account of their race (thereby violating the Fourteenth and Fifteenth Amendments, as well as § 2), or that these provisions result in such a denial, regardless of the purpose underlying their enactment (thus violating § 2). Given the "close connection between § 2 and § 5," *Chisom v Roemer*, 111 SCt 2354, 2367 (1991), it would be "anomalous" to conclude that an existing practice could be challenged under § 2, but that its adoption by a covered jurisdiction is not subject to § 5 preclearance.

The fact that a particular change may have been undertaken for entirely legitimate and non-voting-related reasons, or that whatever the reason for its adoption it has no effect on the voting power of the minority community, goes to the *merits* of § 5 review, and not to whether preclearance must be sought in the first place. The decision about the actual purpose or effect is for the Attorney General or the District Court for the District of Columbia to make, not for local three-judge courts to decide. See Appellants' Brief at 23-29. The Brief for the United States makes clear that the Attorney General is ready, willing, and able to handle such submissions and has a better idea of how to make the substantive distinctions necessary for this type of submission. Brief for the United States at 17-23.

III. In light of § 5's purpose and history, Russell County was required to seek preclearance for Act 79-652.

Essentially, Russell County makes three arguments as to why the transfer of authority over roadwork from the elected County

Commission to the appointed County Engineer should be exempt from § 5. All are, within the context of a § 5 coverage proceeding, meritless. Moreover, the potentially discriminatory impact on appellants' right to vote is clear.

A. *Russell County's legal arguments fundamentally misconstrue the scope and operation of § 5.*

First, appellee raises arguments that are more properly addressed either to the Attorney General or to the District of Columbia District Court. Thus, for example, its claim that blacks are actually better off under the unit system, Russell Brief at 28-30, is simply beside the point. It goes to whether the change in fact had a discriminatory purpose or effect.[8] *See Georgia v United States,* 411 US at 534.

Second, appellee advances a conception of § 5--that it is primarily (if not solely) concerned with black registration, Russell Brief at 23-28, and was never intended to reach "minor" or "ministerial" enactments, Russell Brief at 9, 17, 21-22, not expressly connected with going into a voting booth and pulling a lever--that flies in the face of every pronouncement Congress and this Court have made regarding § 5's scope. *See, e.g.,* 1982 House Report at 17 ("The Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render voters [*sic*] meaningless."). Appellee mentions, and then completely ignores, this

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8. Appellee's condescending suggestion that "[g]overnmental integrity benefits black constituents as well as white," Russell Brief at 29, but that somehow black elected officials and the voters they represent are too misguided to understand this, as well as their attempt to insinuate that Commissioner Mack is somehow trying to use governmental funds for private purposes, *see id.* at 29 n. 38 and A-20 to 21, bespeak precisely the kind of exclusionary motives that a full-scale § 5 review might flush out. *See infra* at Part III.B.

Court's emphatic rejection, in *Hampton County*, of the contention that "ministerial" acts do not require preclearance. *See* Russell Brief at 21-22. Congress has repeatedly ratified this Court's statement that § 5 "reach[es] any State enactment which alter[s] the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 544, 566 (1969). There are simply *no* categorical exemptions from § 5 coverage.

The heart of appellee's argument, however, is its purported identification of a "'change in constituency limitation' in § 5 coverage." Russell Brief at 9. Appellee acknowledges that no decision of this Court has ever expressed such a limitation. Russell Brief at 10. In holding that when "an important county officer in certain counties was made appointive instead of elective .... [t]he power of a citizen's vote is affected," and thus preclearance is required, *Allen*, 393 US at 569-70, this Court did not condition its analysis on whether the constituency that elects the appointing body is the same as the constituency that had previously elected the now-appointed official. Nor, as appellee recognizes, did such cases as *Dougherty County Board of Education v White*, 439 US 32 (1978), or *Hadnott v Amos*, 394 US 358 (1969), depend on any change in constituency. Thus, the fact that *some* changes which require § 5 preclearance do involve changes in constituency--for example, changes from district-based to at-large election--hardly requires that *all* changes have such a character.

The reason an elective-to-appointive case does not require a change in constituency to fall within § 5 is clear from *Allen*: the value of the right to vote has been diminished because "after the change [a voter] is prohibited from electing an officer formerly subject to [his or her] approval." 393 US at 570. Before the change in *Bunton*, black voters in Mississippi could cast votes for two separate officials: a school board member *and* a county superintendent of education. Afterwards, they could vote for only one. That is clearly a change affecting voting.

Russell County claims that because it did not formally abolish the office of county commissioner, but simply transferred its central powers to an appointed official (the county engineer), it can

somehow evade the reach of § 5. That sort of formalistic casuistry is precisely what § 5, which "is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters," *Georgia v United States*, 411 US at 531, condemns. Turning the officials actually elected by black voters into mere figureheads clearly denies blacks the right to cast meaningful ballots.

B. *The clear potential for black vote dilution in Act 79-652 requires submission.*

Taken in context, the potential for Act 79-652 to deny or dilute the voting strength of Russell County's black voters is palpable, and convincingly shows why preclearance should have been required. As we have already seen, state and local authorities across Alabama have frequently reacted to the potential for increased black political participation by changing the rules of the game to assure that even if blacks obtain the vote, or start to elect candidates of their choice, total control will remain in white hands. *See supra* Part I.A. Appellee's claim that Act 79-652 could not have been intended to forestall black control over a portion of the county's roadwork because it was enacted "*seven years* before appellants Mack and Gosha or any other black was elected to the Russell County Commission," Russell Brief at 13 n. 11 (emphasis in original), rings hollow in light of the fact that in the 1940's and 1950's, Alabama manipulated its electoral system to ensure that blacks, who were not effectively enfranchised until 1965, would remain excluded from effective power. Moreover, as we pointed out in our opening brief, it was entirely foreseeable in 1979, that blacks *would* soon force Russell County to adopt district elections for the county commission, *see* Brief of Appellants at 34, and given that most of the county's roads are in fact in predominantly black districts, *see* Russell Brief at 30 and A-13, this might have resulted in black voters and the officials they elected controlling a substantial percentage of this critical governmental function.

It is entirely possible, then, that a full-scale review of the

reasons why the county commission pressed for Act 79-652 will show that it was at least in part a pre-emptive strike against black voters' future ability actually to elect county commissioners representing their distinctive interests and the concomitant loss of complete white control over roadwork operations. Given the consistency of such an outcome with Alabama's history, this Court's inquiry is at an end: the county must submit the act for preclearance.

Subsequent events in Russell County illustrate how the potential for discrimination inherent in Act 79-652 became a reality.[9] Had Russell County's commissioners still been "acting autonomously under the district system" in 1986, J.S. A-16; *see also* J.S. A-2 to A-3 (describing the pre-existing system),[10] when black voters first attained the ability to elect commissioners of their choice, then black voters would have had effective control over the officials who supervised roadwork in their districts. Now, of

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9. The final footnote in the brief filed on behalf of the United States misunderstands our argument. Appellants do *not* claim that "a change not subject to preclearance at the time it is implemented" can somehow "thereafter become subject to preclearance because of subsequent, unanticipated changes." Brief for the United States at 26 n. 10. We contend that at the time Act 79-652 was enacted it was subject to preclearance under § 5 as it had been interpreted since *Bunton v Patterson*. Our only point with regard to subsequent, (perhaps) unanticipated changes is that they may sometimes make manifest the discriminatory potential that always existed. Given that, in light of the current election system for the Russell County Commission, the Attorney General might well conclude that the removal of their authority in fact has and *will have* the effect of diluting black voting strength, *cf. City of Rome v United States*, 446 US 156, 186 (1980), it seems clear that there was always the *potential* for such an effect, and thus preclearance was required. (It might, of course, have been the case that in 1979 the Attorney General or the District Court for the District of Columbia would not have foreseen this effect, and would therefore have precleared Act 79-652, but appellants acknowledge that such an error was for those bodies to make.)

10. Appellee's contrary account of the pre-existing system, *see* Russell Brief at 17-20, is beside the point, as they do not claim, let alone show, that the court below was clearly erroneous in its characterization of the system.

course, such authority is lodged in a majority white body--the county commission--chosen by a county-wide, majority white constituency instead.

IV. Etowah's Common Fund Resolution similarly requires submission for preclearance.

Appellee Etowah County contends that the Road Supervision Resolution and the Common Fund Resolution that it passed in the summer of 1987 responded to "two realities": the disparity in road mileage per district and the fact that after the entry of the consent decree in *Dillard v Crenshaw County*, No. 85-T-1332-N (MD Ala Nov 12, 1986), the number of commissioners exceeded the number of road shops. Etowah Brief at 2-3. That account ignores the most significant "reality" to which Etowah County was required to respond: for the first time in its modern history, elections for the Etowah County Commission were structured in a fashion that gave the county's black voters a realistic opportunity to elect a commissioner of their choice. Moreover, appellee's argument asks this Court, for this first time in its § 5 jurisprudence, to adopt a categorical exemption from § 5 coverage.

A. *A full-fledged analysis of the Common Fund Resolution might conclude that it has the purpose or effect of diluting the worth of appellants' votes and therefore submission for preclearance is required.*

Etowah County changed the method of electing the county commission only after a district court had concluded that the pre-existing system had been adopted and refined "with the specific intent of discriminating against black persons," *Dillard*, 640 FSupp at 1360. As this Court noted in *Dougherty County Board of Education*, when it required the preclearance of what was purportedly only an internal school board personnel rule, "the circumstances surrounding [such a rule's] adoption and its effect on the

political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance." 439 US at 42. There, the so-called "personnel" rule was adopted less than a month after the first black candidate for the state legislature announced his candidacy. Here, a so-called "reallocation of official authority," Etowah Brief at 7, occurred immediately upon the heels of the election of the first black commissioner in modern times. This Court can easily hold, in the context of this case, that the Common Fund Resolution might have been adopted with the purpose, or might have the effect, to "wip[e] out overnight" the "advances" Etowah County's black citizens had achieved through the *Dillard* litigation, 1982 Senate Report at 10.

The "blatant and obvious" potential for discrimination that the court below identified with regard to the Road Supervision Resolution, J.S. A-20, is only marginally better hidden with respect to the Common Fund Resolution. If the Etowah County Commission had passed a resolution stating:

- commissioners elected only by white voters must have complete control over the allocation of the county's road budget;

- a commissioner elected by black voters is not permitted to hire road workers; and

- only commissioners elected through processes intended to preserve white supremacy may have access to leftover county road funds

everyone would understand that such a resolution had been passed with the purpose, and would likely have the effect, of rendering black votes largely an academic exercise. Such a hypothetical resolution, explicitly couched in terms of "voters" and "elections," would, we contend, undeniably be subject to § 5 review.

The only difference between that hypothetical resolution and

the Common Fund Resolution actually passed by the Etowah County Commission is that the former is simple-minded while the latter is sophisticated. But the Voting Rights Act, like the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v Lightfoot*, 364 US 339, 342 (1960) (quoting *Lane v Wilson*, 307 US 268, 275 (1939)). The first paragraph of the Common Fund Resolution could reasonably be described, given the timing of its passage, as an attempt to ensure that the majority-white electorate retain its stranglehold on all budgetary decisions, because it ensures that commissioners responsible only to it collectively be given the authority that once was exercised by individual commissioners. Thus, it ensures that even if black voters can elect a commissioner, that commissioner will have no authority that cannot readily be controlled by the white majority.

The second paragraph of the Common Fund Resolution could be described, particularly given the simultaneously adopted Road Supervision Resolution, as a measure depriving black voters of any say in the election of the commissioners who actually hire and engage in day-to-day supervision of the road workers.[11] *Cf.* 1982 House Report at 14 (among the "observable consequence of exclusion" from the electoral process are "(1) fewer services from government agencies, (2) failure to secure a share of local government employment, [and] (3) disproportionate allocation of funds, location and type of capital projects").

Finally, the third paragraph of the Common Fund Resolution could be viewed as a *de facto* extension of the terms of office of white commissioners elected under the old, racially exclusionary system. Congress has explicitly described "extending the term of office of incumbent white officials" as a "chang[e] in rules or

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11. That the Road Supervision Resolution was subsequently enjoined for failure to seek § 5 preclearance does not change the fact that an objective observer, faced with the resolutions passed in tandem, might well conclude that their intended synergistic effect would be to assure that black voters had no say as to issues where one might otherwise foresee their participation, particularly given the fact that one of the four road shops was in fact in the black district.

practices affecting voting," 1970 House Report at 3283; *see also Sellers v Trussell*, 253 FSupp 915 (MD Ala 1966) (3-judge court) (Judge Rives) (same).

In short, Etowah is disingenuously modest when it says that the Common Fund Resolution "merely transferred [responsibilities] among existing office holders." Etowah Brief at 15 n. 21. In a profound sense, Commissioner Presley was *not* an existing office holder. He was, in fact, something wholly unprecedented in modern Etowah history--a person elected *by the black community* to serve on the Etowah County Commission. The Common Fund Resolution was not a "mere transfer" of responsibilities; it looks suspiciously like a complete seizure of authority.

None of this is to say that Etowah County could not convince either the Attorney General or the District of Columbia District Court that the Common Fund Resolution was adopted for entirely legitimate reasons and has no discriminatory effect on the ability of the county's black citizens to participate equally in the political process. Perhaps it can. (We doubt it.) But the preceding account shows that it is entirely possible that those two bodies will conclude that the Common Fund Resolution is simply "the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination and to undermine gains won under other sections of the Voting Rights Act." 1982 Senate Report at 12. Given that possible conclusion, submission for preclearance is required.

B. *Appellee's claim that submission for preclearance of changes such as the Common Fund Resolution is "unnecessary" misconstrues the purpose of § 5.*

Appellee claims that Congress' awareness that discrimination by state and local governments might be "redressed through conventional lawsuits" militates in favor of a narrow reading of § 5. Etowah Brief at 23. But it is precisely because "conventional" lawsuits were inadequate to protect minority voters' rights against new discriminatory stratagems that § 5 was enacted. *See supra*

I.B. From the very outset, this Court has understood that § 5's central goal was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v Katzenbach*, 383 US 301, 328 (1966).

Contrary to appellee's assertion, the possibility that plaintiffs might eventually prevail on either a Fifteenth Amendment or a § 2 intent or results challenge to the Common Fund Resolution, *see* J.S. A-18 n. 17, A-20 n. 18, A-21 n. 21--a possibility which appellee relegates to a somewhat opaque footnote, Etowah Brief at 23 n. 30--argues *in favor of*, rather than against, finding § 5 coverage. Section 5 was enacted precisely to lift the burden of bringing such challenges from individuals such as the appellants in this case by assuring such changes could not be implemented unless an expert federal forum had satisfied itself that they had neither the purpose nor the effect of denying the right to vote.

And appellees' warning that § 5's effect standard would sweep broadly over many reallocations of authority that surely will be innocent of racial discrimination, Etowah Brief at 19, is, again, precisely what Congress intended. The Voting Rights Act seeks to safeguard rules and procedures that assure black citizens fair and full participation in all governmental decisions, even those that do not have a clear racial component. The right to cast an effective vote entails the power of blacks, at last, to have their say about what constitutes good government, a debate that until now has been the exclusive preserve of whites in Alabama.

C. *Appellee's workability argument is simply an attempt to smuggle a per se exemption into § 5.*

Appellee claims that "it is impossible to overstate the magnitude of the expansion of the statutory mandate proposed here." Etowah Brief at 19. Leaving aside the erroneous assertion that appellant's claim requires an "expansion" of § 5--an assertion we have rebutted above--appellee is flatly wrong in contending that requiring preclearance of changes such as the Common Fund Resolution would swamp the preclearance system. Regardless of

the level of deference due to the Attorney General's interpretation of the scope of § 5--and our opening brief and the Brief for the United States explain why the court below should have deferred to his conclusion that preclearance was required, *see, e.g.*, Brief of the Appellants at 37-38; Brief for the United States at 16--his determination that the Department of Justice has adequate resources to conduct a preclearance process that includes submissions of changes such as the Common Fund Resolution can hardly be gainsaid by outsiders. Moreover, any overburdening would not redound to the disadvantage of the submitting jurisdiction, since unless the Attorney General lodges an objection within the statutory period, the jurisdiction would be free to implement its change.

Notably, while appellee contends that there might be problems with assessing the "effects" of some complex proposed changes, *see* Etowah Brief at 20-22, it ignores completely the fact that the Attorney General and the District Court for the District of Columbia have developed substantial expertise both at analyzing those potential "effects" and at flushing out the hidden *purposes* behind proposed changes.

At bottom, appellee's argument reflects precisely the cast of mind that prompted Congress to enact and extend § 5. Requiring preclearance here, it tells us, "would be pointless, since the legislature could always achieve the same result by another means that did not formally reallocate authority ...." Etowah Brief at 26. Put somewhat more baldly, what appellee is telling this Court is that it is clever enough to figure out some way of evading Congress' commitment to fully enfranchising its black citizens.

This assurance that there is *some* vehicle for perpetuating the effective exclusion of Etowah's black citizens from the governing process is the central reason why Congress and this Court have consistently refused to adopt categorical exemptions to the preclearance requirement: if such exemptions were created, jurisdictions would simply "cloak" their "impairment of voting rights ... in the garb of the" exempted category. *Gomillion*, 364 US at 345. Thus, even such a seemingly non-voting related change as "cutting the executive's budget," Etowah Brief at 26,

could, under some circumstances, require preclearance. For example, if the Etowah County Commission had passed a resolution saying "the salary for each county commissioner shall be $25,000, except that the commissioner from District 5 shall receive a salary of only $1," such a change would require preclearance under the rationale of *Dougherty County*, because it has the obvious potential to deter candidates responsive to the majority-black community in District 5 from running. *Cf. Huffman v Bullock County*, 528 FSupp 703 (MD Ala 1981) (§ 5 preclearance is required for a change in office administration policy that requires an elected official to pay the salaries of his support staff because it might discourage blacks from seeking the elective office).

In this case, the possibility that the Common Fund Resolution is simply another chapter in Etowah County's sorry history of depriving its black citizens of their right to vote "and the consequent advantages that the ballot affords," *Gomillion*, 364 US at 346, is simply too obvious to be ignored. The Common Fund Resolution, like the Road Supervision Resolution, must be submitted for preclearance.

Respectfully submitted by,

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